

STATE OF MICHIGAN
COURT OF APPEALS

JEROME GOWDY,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED

November 25, 2014

No. 318165

Genesee Circuit Court

LC No. 11-097356-NO

Before: BORRELLO, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiff Jerome Gowdy appeals as of right an order granting defendant City of Flint's motion for summary disposition under MCR 2.116(C)(7) in this personal injury action. We affirm.

This case arises from plaintiff's claim that while he was riding his bicycle in the City of Flint he unexpectedly encountered a sinkhole that caused him to fall and sustain injuries. Within 120 days of this accident, plaintiff provided defendant with written notice of the incident, including the date it happened, the alleged defect, the location with photographs, the nature of his injuries, and that he was not aware of any witnesses, in accordance with MCL 691.1404. Defendant admitted that it received plaintiff's notice within 120 days and that the notice contained all of the information required by the statute. However, defendant contended that plaintiff's notice was defective because service was not made "either personally, or by certified mail, return receipt requested" as mandated by MCL 691.1404(2) but was sent by regular mail. The parties agreed to stay proceedings in the trial court until this Court decided *Watts v City of Flint*, unpublished opinion per curiam of the Courts of Appeals, issued January 17, 2013 (Docket No. 307686). Based upon this Court's decision in *Watts*, which held that notice must be made in the manner provided by MCL 691.1404(2), the trial court granted summary disposition to defendant and dismissed plaintiff's action.

Plaintiff first argues that *Watts* incorrectly held that failure to serve notice in person or by certified mail under MCL 691.1404 precludes the plaintiff's claim even where the defendant admits it received actual notice of the claim within the time limits prescribed by the statute. We disagree. "This Court reviews de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7)." *Grimes v Mich Dep't of Transportation*, 475

Mich 72, 76; 715 NW2d 275 (2006). Statutory interpretation is a question of law that is also reviewed de novo. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009).

MCL 691.1404 provides in pertinent part:

(1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

(2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding

Plaintiff argues here, as the plaintiff did in *Watts*, that since MCL 691.1404(2) only lists ways that notice “may” be served, those manners of service are permissive, not mandatory. This argument fails to take into account the mandatory language contained in MCL 691.1404(1) that requires that notice “shall” contain certain specific information and be served within 120 days of the injury. As this Court reasoned in *Watts*, the two provisions read together indicate that before a plaintiff can recover under a highway exception to the governmental immunity law, a plaintiff must serve notice of the claim, containing certain specified information, within 120 days, either personally or by certified mail, return receipt requested. MCL 691.1404(1) and (2). As we noted in *Watts*:

Although the word “may” ordinarily signifies a permissive provision, *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), “[a] necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to . . . the permissive word ‘may’ unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole.” *Browder v Int’l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). [*Watts*, unpub op at 3.]

Plaintiff is unpersuasive in contesting the holding in *Watts* and merely reiterates the arguments made by the plaintiff in that case that were rejected. *Watts* interpreted MCL 691.1404 as it was written. Any other interpretation of the statute would negate the types of service specified and allow service to be made in any way chosen by a plaintiff. *Watts* was correctly decided in accordance with the plain language of the statute and applicable Michigan case law such as *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), in which our Supreme Court found that MCL 691.1404 was “straightforward, clear, unambiguous” and thus “must be enforced as written.”

Next, plaintiff argues that *Watts* should not be applied retroactively to dismiss his cause of action because it overruled the long standing holding that “failure to serve the notice personally or by certified mail is inconsequential where, as here, the notice was timely received.” *Hussey v City of Muskegon Hgts*, 36 Mich App 264, 271; 193 NW2d 421 (1971). The

retroactivity of earlier judicial decisions is a question of law and is reviewed de novo. *Lincoln v General Motors Corp*, 461 Mich 483, 490; 607 NW2d 73 (2000).

“Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity. For example, a holding that overrules settled precedent may properly be limited to prospective application.” [*Rowland*, 477 Mich at 220, quoting *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) (internal citations omitted).]

Plaintiff contends that *Watts* clearly established a new rule of law mandating that the service requirements of MCL 691.1404 must be strictly complied with and therefore, it should only be applied prospectively. Again, we disagree.

In deciding whether to apply a decision retroactively, this Court considers whether there are exigent circumstances that would require a prospective application and also whether it was constitutionally legitimate for the rendering of prospective decisions that are “in essence” advisory opinions. *Wayne Co v Hathcock*, 471 Mich 445, 484-485 n 98; 684 NW2d 765 (2004). In the instant case, no exigent circumstances exist that would warrant a prospective application.

Plaintiff argues that he served notice of his injury by regular mail because he relied to his detriment upon *Hussey*, 36 Mich App 264, which held that failure to serve notice personally or by certified mail was inconsequential when notice was, as here, filed timely unless the defendant could show prejudice. Plaintiff also argues that *Rowland* did not actually overrule *Hussey* because *Rowland* did not specifically hold what manner of service was required under MCL 691.1404(2). Plaintiff further asserts that *Watts* set forth a new rule of law since it changed the *Rowland* Court’s interpretation of MCL 691.1404(2).

Plaintiff’s arguments are not persuasive. First, *Hussey* did not state that MCL 691.1404(2) permits service by any means other than personal service or registered mail but rather held that the manner of service did not matter as long as service was timely and the government defendant was not prejudiced. Second, *Rowland* was decided over 30 years after *Hussey* was decided and clearly set forth that MCL 691.1404 and its requirements require strict compliance. Third, plaintiff served defendant in contravention of the unambiguous service requirements set forth in MCL 691.1404.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens